

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 11, 2007 Session

KATHERINE RANGE, ET AL. v. C. M. SOWELL, JR., D.D.S.

**Appeal from the Circuit Court for Maury County
No. 10615 Jim T. Hamilton, Judge**

No. M2006-02009-COA-R3-CV - Filed October 29, 2009

The son of a nursing home patient claimed that the defendant dentist committed battery against his mother by performing dental work on her without obtaining proper consent from either the mother or from the son in his capacity as her attorney-in-fact. The dentist argued that he had operated under a general consent to medical care that the son executed at the time of his mother's admission to the nursing home, that the mother was not injured by the care he provided, and that the statute of limitations barred the son's claims. The trial court granted summary judgment to the dentist. We affirm the summary judgment, but modify that part of the trial court's award of discretionary costs which held the son personally liable for those costs.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed as Modified**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J. and ROBERT S. BRANDT, SP. J., joined.

James L. Weatherly, Nashville, Tennessee, counsel for the appellant on appeal, Katherine Range, By Next Friend, Executor/Administrator of the Estate of Katherine Range: Sam Range.

David A. Bates, C. Nicholas Fossett, Columbia, Tennessee, for the appellee, C. M. Sowell, Jr., D.D.S.

OPINION

I. BACKGROUND

Martha Katherine Range lived with her son and his wife, Sam and Connie Range, in Columbia, Tennessee. At some point she suffered a broken hip and underwent hip replacement surgery. On May 28, 1998, she executed a durable power of attorney for health care, appointing Sam Range as her attorney-in-fact "to make health care decisions for me as herein provided if I am

incapacitated or otherwise unable to make such decisions for myself.” Connie Range was named as a secondary attorney-in-fact in the event that Sam Range was unwilling or unable to act on her behalf.¹

On May 30, 2000, Ms. Range was admitted to Maury Regional Hospital with a complaint of abdominal pain. On June 8, 2000, her physician, Dr. Paul Perryman, discharged her from the hospital, and she was admitted to Heritage Manor, a nursing home in Columbia, Tennessee. Her diagnosed conditions at that time included Alzheimer’s Disease, congestive heart failure, osteoporosis, diabetes, and pleural effusion on both lungs. She was eighty-four years of age at the time.

Two documents were executed at the time of Ms. Range’s admission to the nursing home. The first document titled “AUTHORIZATIONS” includes the authorization to “Dr. Perryman (and assistants)” to “administer medical treatment as is necessary.”² What appears to be the signature of Sam Range appears on the signature line for “Resident/Responsible Party” at the bottom of the page.³

The second document, signed by Dr. Perryman, contains admissions orders listing Ms. Range’s medications, her diagnosis, and the level of care she was to receive in the nursing home. The document also included boxes to be checked for Optometrist, Podiatrist, and Dentist under the heading “to be used as needed.” All three boxes were checked. Dr. Perryman admitted in his deposition that he probably did not check those boxes and that “somebody else would have.” But he testified that it was his intention in signing what he characterized “as a pretty standard form for a nursing home patient” to give permission to the appropriate provider to clip toenails, prescribe glasses, or extract teeth as needed. The authenticity of these two documents is not crucial for purposes of this appeal.

In July of 2000, a speech therapy progress note indicated that Ms. Range had one tooth that was rotten and painful and needed to come out (this was apparently her sole remaining tooth). On August 21, 2000, Ms. Range was transported to the office of the defendant dentist, Dr. C.M. Sowell, where he extracted her tooth under local anesthesia.⁴ Dr. Sowell’s name was on a list of “Service

¹ Mr. Range testified at deposition that his work sometimes required him to be away from home for months at a time.

² The other authorizations included release of “any medical information as may be deemed necessary” to Dr. Perryman and the nursing home, consent to use Ms. Range’s name and photograph for medical record documentation, consent to transport her to community outings or physician appointments, and consent to order medications from the pharmacy on her behalf.

³ During deposition, Sam Range denied signing the document. He also denied that the signature on the nursing home admission agreement was his.

⁴ The record includes a note from nurse Kay West stating that she contacted the family regarding transportation to the dentist’s office and that arrangements for the dental visit would be by private pay. Sam Range denied by affidavit that the family had been contacted, and at deposition he characterized the note as “a gross forgery.”

Providers and Preferences” in a document containing medical information about Ms. Range. Because he believed that the nursing home would do whatever was appropriate to obtain the proper authorization, he testified that he did not attempt to obtain consent for the procedure from Ms. Range or from her attorney-in-fact.

Nursing notes indicated that Ms. Range was five feet, five inches tall and that she weighed less than 95 pounds in July of 2000. Her weight steadily increased after her tooth was extracted, reaching 114 pounds on November 21, 2000. Ms. Range’s physician, Dr. Perryman, testified that such weight gain was probably a sign of nutritional improvement, resulting from the extraction of the painful tooth.

Fourteen months after the tooth extraction, in November of 2001, Dr. Sowell came to the nursing home and relined Ms. Range’s ill-fitting dentures. Sam Range asserts that he was unaware that either of these dental procedures had been performed until his wife received “an ambiguous note” from the nursing home on February 22, 2002, noting a payment of \$400 due on behalf of Katherine Range to C.M. Sowell Jr., D.D.S. Dr. Perryman testified at his deposition that Mr. Range called him around that date to ask him if he was aware of dental treatment that his mother had received. On or about March 6, 2002, Connie Range mailed a check for \$400 to Heritage Manor, payable to Dr. Sowell.

Mr. Range states that when he learned of the check, he and his wife went to the nursing home to get additional information about the procedures that his mother underwent. He claims that he received very little cooperation. A complaint was filed against Dr. Sowell with the Tennessee Board of Dentistry. The Board found after investigation that Dr. Sowell had extracted Ms. Range’s tooth and had relined her dentures without obtaining informed consent from her or from her legally authorized personal representative. The Board issued a letter of reprimand on November 18, 2003.

II. LEGAL PROCEEDINGS

Sam Range filed the present complaint in the Circuit Court of Maury County on December 1, 2003, as next friend of Katherine Range. He named Dr. Sowell as the sole defendant. Mr. Range claimed that his mother had been mentally incompetent since the late 1990’s and that she was incapable of consenting to medical or dental treatment. He accordingly asserted two claims: that Dr. Sowell’s failure to obtain informed consent fell below the standard of care for dentists and that the performance of dental procedures on Ms. Range without any consent at all amounted to medical battery, causing her to suffer great pain and distress. He asked to recover damages for “medical and dental expenses, pain and suffering, and infliction of medical battery,” in an amount “not to exceed \$100,000.” Mr. Range did not attempt to recover on the theory that either procedure was unnecessary or performed below the applicable standard of care.

Dr. Sowell responded with a motion to dismiss under Tenn. R. Civ. P. 12.02(6) for failure to state a claim. He asserted, among other things, that Mr. Range's claims were time-barred, because the one-year statute of limitations for personal injury claims had passed before the complaint was filed. He also argued that any claim derived from the tooth extraction on August 21, 2000 was also barred by the three-year medical malpractice statute of repose. Mr. Range subsequently amended his complaint to add an allegation that Dr. Sowell had been guilty of fraudulent concealment, tolling the medical malpractice statute of repose. The trial court declined to grant the motion to dismiss.

Dr. Sowell then filed a motion for summary judgment on December 14, 2005, accompanied by a statement of undisputed material facts. Katherine Range died shortly thereafter, on December 31, 2005.⁵ A suggestion of death was filed with the court, and the parties agreed to continue the case with Sam Range substituted as plaintiff in his capacity as Executor/Administrator of his mother's estate. Due to an oversight, the order of substitution was not filed with the court at that time.⁶

Mr. Range filed a response to Dr. Sowell's statement of undisputed facts which challenged almost all of the facts by simply stating that they were disputed, without providing evidence to refute the defendant's statement of facts. In some cases, his response was ambiguous.⁷ Responding to facts that were based upon the records of the nursing home, Mr. Range simply characterized all of those alleged facts as disputed on the basis of his contention that the records had not been properly authenticated. But he did not address the substance of the alleged facts.

The trial court conducted a hearing on the motion for summary judgment on April 21, 2006. The defendant argued that he was entitled to summary judgment on three separate grounds: that he had received proper authorization for Katherine Range's dental treatment, that there was no evidence of injuries, and that the plaintiff's claims were time-barred by the statute of limitations and the statute of repose. The trial court granted summary judgment to Dr. Sowell on all three grounds.

Mr. Range filed a motion to alter or amend the order, and Dr. Sowell filed a motion for discretionary costs. The trial court conducted a hearing on the two motions, after which it denied the motion to alter or amend and awarded Dr. Sowell his discretionary costs in the amount of \$1,838, holding Mr. Range personally liable for payment. This appeal followed.

⁵ At the time of her death, Katherine Range was no longer living at Heritage Manor, but at another nursing home to which Sam Range had moved her.

⁶ Consequently, the actual plaintiff is the Estate of Katherine Range. However, we will continue to refer to the plaintiff party as Mr. Range, in his capacity as the estate's representative.

⁷ For example, Mr. Range suggested in a somewhat ambiguous way that he had not signed the nursing home admission agreement. He also suggested that he did not sign the authorization for Dr. Perryman to furnish medical care to his mother, while not exactly denying that he had done so ("The document relied upon by the Defendant and attached as Exhibit D to the Motion for Summary Judgment and identified as HQM 464 does not contain the signature of Mr. Sam Range.").

III. THE STANDARD OF REVIEW

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76, 84 (Tenn. 2008); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). We review the summary judgment decision as a question of law. *Id.* Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). Those requirements are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Blair*, 130 S.W.3d at 764.

The moving party has the burden of demonstrating it is entitled to judgment as a matter of law and that there are no material facts in dispute. *Martin*, 271 S.W.3d at 83; *McCarley v. West Quality Food Service*, 960 S.W.2d 585, 588 (Tenn. 1998). To be entitled to summary judgment, a defendant moving party must either (1) affirmatively negate an essential element of the non-moving party's claim or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1, 9 (Tenn. 2008). If the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of a genuine issue of material fact. *Martin*, 271 S.W.3d at 84; *Hannan*, 270 S.W.3d at 5; *Staples v. CBL & Associates*, 15 S.W.3d 83, 86 (Tenn. 2000) (citing *Byrd v. Hall*, 847 S.W.2d at 215).

In our review, we must consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, and we must afford that party all reasonable inferences. *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 507 (Tenn. 2001).

"When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact." *Staples v. CBL & Associates*, 15 S.W.3d at 86 (citing *Byrd v. Hall*, 847 S.W.2d at 215). If, and only if, the moving party successfully negates an essential element of the nonmoving party's claim or demonstrates the nonmoving party's inability to prove an essential element at trial, the burden shifts to the non-moving party to at least create a dispute of fact as to the element. *Hannan v. Alltel Publishing Co.*, 270 S.W.3d at 7 (discussing *McCarley*).

IV. THE STATUTE OF LIMITATIONS AND THE STATUTE OF REPOSE

Dr. Sowell argues that the claims against him are barred both by the applicable statute of limitation and statute of repose. In discussing the limitations issue, it is crucial to remember that plaintiff's claims pertain to two separate incidents that occurred months apart. First, Mr. Range attempts to recover for the tooth extraction in August of 2000. Second, he attempts to recover for

the denture relining in November of 2001. Mr. Range alleges that Dr. Sowell is liable for both of these incidents under two legal theories; (1) that failure to get informed consent constitutes medical malpractice, and (2) that performance of the procedure without consent is medical battery. It is not necessary to parse the difference between these two claims, if any, at this juncture since the limitations period for both is one year.⁸

A. Statute of Limitation

Statutes of limitations are enacted for the purposes of encouraging injured parties to pursue their legal remedies in a prompt manner and to protect defendants from stale claims and vexatious litigation. The rationale behind them is the presumption that a person having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the power to sue. *Vason v. Nickey*, 438 F.2d 242, 244 (6th Circuit 1971) (quoting *Hackworth v. Ralston Purina Co.*, 381 S.W.2d 292, 294 (Tenn. 1964)).

Such statutes are not disfavored, for they are expressions of public policy which give plaintiffs

. . . what the legislature deems to be a reasonable time to present their claims; and it protects defendant and the courts from having to deal with stale cases where the search for the truth and justice may be seriously impeded by the death or disappearance of witnesses, fading memories, disappearance of documents or other loss of material evidence.

Wyatt v. A-Best, Co., Inc., 910 S.W.2d 851, 855 (Tenn. 1995) (citing *Spence v. Miles Laboratories, Inc.*, 810 F.Supp. 952, 964 (E.D. Tenn. 1992)).

Statutes of limitation are held to run from the date that the cause of action accrues, which in most cases means the date of the alleged injury. To mitigate the possibly harsh effects that could result from too inflexible an application of the statute of limitations, our courts created an exception to the statute in the form of the “discovery doctrine,” which states that a plaintiff’s cause of action does not accrue until the plaintiff discovers, or when in the exercise of reasonable care should have discovered, that he has been injured. *Pero’s Steak and Spaghetti House*, 90 S.W.3d at 621; *Stanbury v. Bacardi*, 953 S.W.2d 671, 675 (Tenn. 1997); *Hoffman v. Hospital Affiliates, Inc.*, 652 S.W.2d 341, 342 (Tenn. 1983); *Teeters v. Curry*, 518 S.W.2d 512, 515 (Tenn. 1974).

⁸For our purposes, there is no meaningful difference between the one-year statute of limitations for medical malpractice under Tenn. Code Ann. § 29-26-116 and the one-year statute of limitations for injuries to the person under Tenn. Code Ann. § 28-3-104(a)(1), which applies to battery claims. *Bailey v. Tasker*, 146 S.W.3d 580, 585 (Tenn. Ct. App. 2004). In fact, Tenn. Code Ann. § 29-26-116 refers specifically to the Tenn. Code Ann. § 28-3-104 statute of limitations.

B. Statute of Repose

Our legislature has also established statutes of repose in specific types of cases, such as those involving medical malpractice (three years), to place an outer limit or ceiling on the time in which an action may be brought. *See* Tenn. Code Ann. § 29-26-116(a)(3). Without such a ceiling, the operation of the discovery rule would potentially allow a plaintiff to extend the statute of limitations indefinitely. *Bruce v. Hamilton*, 894 S.W.2d 274, 276 (Tenn. Ct. App. 1993).

The running of a statute of repose is usually triggered by something other than the accrual of the cause of action. *See Wyatt v. A-Best Products, Inc.*, 924 S.W.2d at 102 (ten year statute of repose for products liability is ten years from purchase of the defective product, not ten years from injury resulting from use of that product). “A statute of limitations normally governs the time within which legal proceedings must be commenced after a cause of action accrues. A statute of repose, on the other hand, limits the time within which an action may be brought and is unrelated to the accrual of any cause of action.” *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 515 (Tenn. 2005) (citing *Jones v. Methodist Healthcare*, 83 S.W.3d 739, 743 (Tenn. Ct. App. 2001)).

C. Analysis

The final order in this case declared both of Mr. Range’s claims were barred by the applicable one year statute of limitations at Tenn. Code Ann. § 29-26-116(a)(1). Furthermore, the trial court found that the claims arising from the extraction of Ms. Katherine Range’s tooth on August 21, 2000, were also barred by the three year statute of repose found at Tenn. Code Ann. § 29-26-116(a)(3).

The relevant portions of Tenn. Code Ann. § 29-26-116 below:

(a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.

(2) In the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.

(3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

As can be seen, Tenn. Code Ann. § 29-26-116(a)(2) codifies the discovery doctrine in medical malpractice cases, while (a)(3) establishes a statute of repose, as well as an extension of the statute of repose where fraudulent concealment can be proved.

It appears at first glance that all of Mr. Range’s claims are barred by the one-year statute of limitations since he did not file his complaint until more than a year after any of the acts complained

of were performed, on December 1, 2003. He argues that he did not discover that Dr. Sowell had performed unauthorized dental procedures on his mother until March 12, 2003, when he received a set of medical records which he had requested from Heritage Manor. We believe, however, that the trial court was correct to find that his acknowledged receipt of a bill for Dr. Sowell's services and payment of that bill in March of 2002 negate any possible argument that the discovery rule can rescue his claims from the bar of the statute of limitations.

Nonetheless, a statute that applies to people suffering under a legal disability throws a lifeline to Mr. Range's claims. Tenn. Code Ann. § 28-1-106 reads

If the person entitled to commence an action is, at the time the cause of action accrued, either within the age of eighteen (18) years, or of unsound mind, such person, or such person's representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from the removal of such disability.

Persons of unsound mind include those incapable of attending to any business or of taking care of themselves. *Owen v. Summers*, 97 S.W.3d 114, 124 (Tenn. Ct. App. 2001). The parties do not dispute that at the time of the events complained of Katherine Range met that definition, and they do not claim that she recovered from her disability prior to her death. "The disability of unsound mind is removed when the individual is no longer of unsound mind, due to either a change in the individual's condition or the individual's death." *Abels ex rel. Hunt v. Genie Industries, Inc.*, 202 S.W.3d 99, 105 (Tenn. 2006). Consequently, Tenn. Code Ann. § 28-1-106 suspends the operation of the statute of limitations in this case so that claims arising from the tooth extraction and denture relining are not barred by the one-year statute of limitations.⁹

The matter stands on a different footing when it comes to the statute of repose. As we stated above, a statute of repose is meant to impose an absolute ceiling on the time within which a claim may be brought, and it operates independently of the date on which the cause of action is deemed to have accrued. The three year statute of repose for medical malpractice at Tenn. Code Ann. § 29-26-115(a)(3) does not begin to run upon the date of discovery of the injury, but rather upon the date of the allegedly negligent act. *Benton v. Snyder*, 825 S.W.2d at 413(citing *Braden v. Yoder*, 592 S.W.2d 896, 897 (Tenn. Ct. App. 1979)). Since the tooth extraction occurred in August of 2000 and suit was not filed until December 1, 2003, any claim based on the extraction is barred by the statute

⁹Dr. Sowell argues that even if Ms. Range was of unsound mind, her son brought suit on her behalf, and since he was competent at all times, Tenn. Code Ann. § 28-1-106 should not apply. However, our Supreme Court has addressed that very argument, and conclusively rejected it. In *Sullivan v. Chattanooga Medical Investors*, 221 S.W.3d 506 (Tenn. 2007), the Court declared that "the person entitled to commence the action" under Tenn. Code Ann. § 28-1-106, means the injured party, or the party to whom the claim belongs rather than the individual authorized to act for the party. *Sullivan v. Chattanooga Medical Investors*, 221 S.W.3d at 509. The Court specifically ruled that the execution of a durable power of attorney does not remove the disability of "the person entitled to commence the action" for the purposes of Tenn. Code Ann. § 28-1-106. *Id.*

of repose.¹⁰ Defendant relined Ms. Ranges' dentures in November of 2001, so the statute of repose does not bar claims arising from that act. Consequently, the trial court is affirmed in its finding that any claim resulting from the extractions is time barred. The only remaining claims, therefore, pertain to the denture relining.

We are not persuaded by Mr. Range's argument that the medical malpractice statute of repose applies only to his medical malpractice claim and is inapplicable to his battery claim. First, he did not raise that issue in the court below. Under Tenn. R. App. P. Rule 36, this court is not required to grant relief "to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Thus, appellate courts will generally decline to consider issues that were not raised first in the trial court. *Heatherly v. Merrimack Mutual Fire Ins. Co.*, 43 S.W.3d 911, 916 (Tenn. Ct. App. 2000); *Reid v. State*, 9 S.W.3d 788, 796 (Tenn. Ct. App. 1999). Second, we note that in *Benton v. Snyder*, 825 S.W.2d 409 (Tenn. 1992), our Supreme Court applied the three year medical malpractice statute of repose to a claim for battery against a surgeon who allegedly performed a sterilization procedure on a female patient without her consent during an emergency cesarean section.

We are also unpersuaded by Mr. Range's claims that the statute of repose is extended by Dr. Sowell's alleged fraudulent concealment. The statute of repose for medical malpractice (and for medical battery as well) is three years, although Tenn. Code Ann. § 29-26-116(a)(3) allows for its extension in cases involving fraudulent concealment. Mr. Range offers a range of allegations about delays in the delivery of medical records to suggest that he is entitled to the fraudulent concealment extension, none of which we believe amounts to fraudulent concealment. But even if we conceded, *arguendo*, that Mr. Range's various allegations somehow demonstrated that Dr. Sowell had fraudulently concealed from Mr. Range the fact that he had performed dental work on his mother, payment of the bill for Dr. Sowell's services in March of 2002 triggered the one-year period allowed in the event of fraudulent concealment which allows the claim to be brought "within one (1) year after discovery that the cause of action exists." The cause of action was known in February and March of 2002 but the claim, however, was not filed until over a year later, in December of 2003.

It therefore logically follows that the trial court was correct to hold that the three-year statute of repose had passed on any claims based upon the August 21, 2000 extraction of Katherine Range's tooth prior to the filing of the present lawsuit. Thus, the only remaining claims that are not time-barred are those based on the relining of Ms. Range's dentures in November of 2001.

¹⁰The mental incompetency of Ms. Range does not affect the operation of the statute of repose. In *Mills v. Wong*, 155 S.W.3d 916 (Tenn. 2005), our Supreme Court was faced with the question whether Tenn. Code Ann. § 28-1-106 can operate to toll the statute of repose in medical malpractice cases involving mental incompetency. The court held that the plain terms of the statute precluded tolling in such cases. See also *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 185 (Tenn. 2000) (holding that the ten-year products liability statute of repose is not tolled by the plaintiff's mental incompetency).

V. INJURY

In addition to holding that the plaintiff's claims were time barred, the trial court also held that Dr. Sowell was entitled to a judgment as a matter of law because the plaintiff had no proof that any of Dr. Sowell's alleged acts or omissions were the proximate cause of any injury to Ms. Range. Our determination that the statute of repose bars claims based on the August 2000 extraction procedure means we need only consider injuries arising out of the November 2001 relining procedure. Because the plaintiff failed to produce any evidence that Ms. Range suffered a compensable injury as a result of the November 2001 relining procedure, summary judgment was appropriate.

Whether a claim is for medical malpractice or battery, injury is an essential element of the claim. In order to prevail on a medical malpractice claim, the plaintiff must prove that she suffered an injury as the result of the negligence of a defendant who failed to act with ordinary and reasonable care in accordance with the recognized standard of professional practice in his profession. Tenn. Code Ann. § 29-26-115. When the claim is for medical battery, liability attaches for any injuries resulting from the treatment or procedure not consented to, regardless of whether or not those injuries resulted from negligence. *Shadrick v. Coker*, 963 S.W.2d at 732. In either case, there must be a showing of some sort of compensable injury in order for the plaintiff to prevail.

Dr. Sowell's motion for summary judgment was supported by Dr. Sowell's own affidavit. Paragraph 27 of Dr. Sowell's Statement of Undisputed Facts asserts "[a]t no time did [Ms. Range] suffer injuries as a proximate result of any act or alleged omission by Dr. Sowell," repeating a statement in his affidavit asserting that at no time did Ms. Range suffer any injuries as a result of his actions. This affidavit, together with other evidence showing that Ms. Range actually benefitted from the relining procedure,¹¹ affirmatively negated the injury element of the plaintiff's claim and shifted the burden to the plaintiff to create at least a dispute of fact as to the whether Ms. Range suffered a compensable injury.

In response to the portion of Dr. Sowell's motion asserting the lack of any injury and to paragraph 27 of Dr. Sowell's Statement of Undisputed Facts, the plaintiff relied solely on the affidavit of Michael P. Tabor, D.D.S. The relevant portion of Dr. Tabor's affidavit states that "[a]s a result of Dr. Sowell's procedure on Ms. Range, she had a tooth extracted which had previously been used to locate the placement of Ms. Range's partial." This statement clearly refers only to the August 21, 2000 extraction procedure. It has no relevance whatsoever to the November 2001 relining procedure. Thus even assuming for the purpose of argument that the affidavit is sufficient to create a dispute of fact as to whether Ms. Range suffered an injury, the alleged injury would pertain only to claims that we have determined are barred by the statute of repose.

Neither the plaintiff's response to the motion for summary judgment nor the response to the

¹¹ Dr. Sowell testified that even a person who has no natural teeth remaining and has been placed on a soft diet can enjoy improvements in speech and appearance from the use of a set of dentures that fit and are comfortable.

statement of undisputed facts cite to any evidence, expert or otherwise, that Ms. Range suffered any compensable injury as a result of the November 2001 relining procedure. Accordingly, the trial court did not err in granting summary judgment to Dr. Sowell on the ground the plaintiff failed to produce evidence creating a genuine dispute of fact as to the whether Ms. Range suffered a compensable injury.

VI. CONSENT

The trial court also granted summary judgment on a third ground, that there was no genuine dispute of material fact as whether Dr. Sowell had received effective consent to treat Ms. Range. In light of our determinations regarding the statute of repose and the lack of proof regarding any injury, however, we find it unnecessary to discuss the issues surrounding consent.

VII. DISCRETIONARY COSTS

The final issue on appeal involves the trial court's award of discretionary costs in the amount of \$1,838 to Dr. Sowell. The award was assessed against Mr. Range both individually and in his capacity as executor of the estate of Katherine Range. Tenn. R. Civ. P. 54.04(2) authorizes the trial court to award to the prevailing party the reasonable and necessary costs incurred in the preparation and trial of the case. The decision to award or not to award discretionary costs lies within the discretion of the trial court. *Shofner v. Red Food Stores*, 970 S.W.2d 468, 470 (Tenn. Ct. App. 1997) (quoting *Lock v. National Union Fire Ins. Co.*, 809 S.W.2d 383, 490 (Tenn. 1991)).

Mr. Range challenges neither the court's exercise of its discretion in awarding the costs nor the amount of such costs, but relying on the above-cited *Shofner* opinion, he argues that since he was at all times only acting in his capacity as the personal representative of Katherine Range, the trial court erred in assessing those costs against him personally. We agree. Since the court's order made Mr. Range responsible for the costs also in his capacity as the personal representative of the estate, we modify the trial court's order to eliminate reference to Mr. Range individually as liable for discretionary costs.

VIII.

The grant of summary judgment by the trial court is affirmed, but the award of discretionary costs is modified to reflect that it runs against Sam Range in his capacity as executor/administrator of his mother's estate, and not in his individual capacity. We remand this case to the Circuit Court of Maury County for any further proceedings necessary. Tax the costs on appeal to the appellant, Sam Range, Executor/Administrator of the estate of Katherine Range.

PATRICIA J. COTTRELL, JUDGE